The judicial decision at which the Courts eventually arrived ought to have been based upon materials in the shape of evidence, such as they were, which the parties produced before the Court. For this reason alone, we find it necessary to reverse the decision of the Lower Appellate Court, and remand the case for retrial.

But there is another reason, as it seems to us, why this course must be taken, namely, that the Subordinate Judge has, we think, dealt wrongly with the question of the expenses incurred by the tenant in cultivation. Although the Subordinate Judge has rightly sketched out the principle which ought to govern this investigation, yet he has adopted, so far as we can see, an entirely arbitrary mode of arriving at the costs which the tenants must be supposed to be at in producing the crops. It was the duty of the Court to endeavour as best as it could to put the plaintiff in the same position as he would have been in had he been allowed by the defendant during the two years in question to have had quiet possession and cultivation of his land. In other words, the Court ought to have done its best to estimate from the evidence before it what would have been the net profits which the plaintiff would have earned by the cultivation of his land during that period, had he been in possession. And in so doing, inasmuch as the defendant was admittedly a wrong-doer and the plaintiff had been turned out of his cultivation without cause, the Court would be right in being liberal towards the plaintiff when forming an estimate of these profits. And for the purpose of getting at the net profits, two steps have to be taken : the Court must, in the first place, endeavour to ascertain the amount of the gross profits, and next the probable amount of the cost necessary to be incurred in obtaining those profits. But there can hardly be any doubt that simply by way of guess to cut off one-half of the rough profits is not the proper way of attaining this last object, nor indeed is it likely to lead even to an approximately true result. Moreover, rent ought not to have been involved in the item of expenses. If the defendant would have been entitled to be paid rent for this land during the period in question by the plaintiff had the latter been allowed to continue in undisturbed possession, then the defendant might, perhaps according to the circumstances of the case, be allowed to set off that amount against the damages which he otherwise would have to pay to the plaintiff. But it is not stated in either judgment as a fact that the defendant was entitled during these years to receive rent from the plaintiff, and neither is it said what the amount of rent was which the plaintiff was bound to pay to any one for the land. If he was bound to pay the rent to any other person than the defendant, then he was entitled to have the money for that purpose paid to him by the defendant, and the equivalent sum ought not to have been deducted from his profits. It is the net profits of his land, after deducting the expense of cultivating it, which enables a tenant to pay his rent. Unless the plaintiff was bound to pay rent to the defendant, and unless under the circumstances of the case it was right to allow the defendant to set-off the unpaid amount of rent against the plaintiff's demand, the item of rent ought not to be deducted from the estimate of his wassilat, and even in that case only the actual amount of rent due should be so deducted. We are not in a position to say whether rent should or should not in this present case be deducted. That is one of the questions which the Lower Court has to determine between the parties. We confine ourselves, therefore, simply to reversing the decision of the Lower Appellate Court, and remanding the case to that Court for retrial.

The costs of this appeal will abide the event.

The 4th December 1874.

Present :

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Zur-i-peshgee (Usufructuary) Mortgage—Limitation.

Case No. 2427 of 1873.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 4th August 1873, *affirming a decision of the Moonsiff of Behar, dated the* 25*th January* 1873.

Syud Akbur Hossein and others (Plaintiffs), *Appellants,*

versus

Toolsee Ram and others (Defendants), *Respondents.*

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Appellants.

Mr. M. L. Sandel and *Baboo Mohesh Chunder Sandel* for Respondents.

In a suit to recover possession of Mouzah M., plaintiff alleged that the land had been given in *zur-i-peshgee*

mortgage to defendant No. 1 who opposed his re-entry after redemption. Defendant No. 2 who was in possession, pleaded that they were kharijee lands of a different mouzah, and had been in possession of himself and his ancestors for a number of years.

HELD, that as it was found that defendant No. 2 was not identical with the mortgagees, between whom and defendant No. 2 there was no collusion, plaintiff was barred by limitation unless he could show that he had been in possession within 12 years prior to the suit.

Kemp, J.—THE plaintiff, who is the special appellant in this case, sues two parties on the allegation that he, the plaintiff, was the malik of Mouzah Mukdoompore, that a settlement had been effected with his ancestors for that mouzah in the year 1794, corresponding with the year 1201 Fuslee; that on the 8th of February 1826, a mortgage of the aforesaid mouzah was granted to Khetter Raoot and others. This mortgage has been designated during the whole of the proceedings as an ijarah, but it appears that it was a zur-i-peshgee ijarah, tantamount to a mortgage. The term of the original lease was from 1235 to 1243 Fuslee. The plaintiff says that up to the year 1869, the mortgagees, the zur-i-peshgeedars, were in possession as it was not until the redemption of the property in 1869 that the plaintiff became entitled to re-enter; that on attempting to collect the rent of the disputed lands he was opposed by the defendants 1st party, the zur-i-peshgeedars or mortgagees, who alleged that the disputed lands formed a separate kullum under the designation of Arazee Kharizee Faizoollapore. The plaintiff, therefore, brings this suit alleging that this was a fraud on the part of the defendants, and that his cause of action accrued to him when he was opposed by the defendants in 1869. The Fureek Awul defendants, 1st party, the zur-i-peshgeedars, did not put in any written statement.

The Fureek Doohum, or defendants 2nd party, who are, as they state parties entirely independent of the zur-i-peshgeedars or mortgagees, allege that neither the plaintiff nor his ancestors have ever been in possession of the disputed property; that the suit of the plaintiff is barred; and on the merits they state that these lands have always been kharijee jumma lands; that they were never incorporated in the nizamut lands of Mouzah Mukdoompore; that a settlement of this property was made with their ancestor Ashkurum; that many years subsequent to that settlement, the Government attempted to resume these lands; that a resumption did take place; that a summary settlement was made with their ancestors, but that subsequently the land comprising an area of 100 beegahs was released to them in September 1839.

The first Court found for the defendants, and as the Moonsiff's decision has been adopted by the Officiating Judge of Patna, who does not think it necessary to give any reasons of his own, we have had the Moonsiff's decision read to us. We find it to be a very careful decision, and he finds that the suit of the plaintiff is clearly barred.

There has been considerable argument in this case before this Court, but we think that it is very clear that unless it can be clearly shown that the Fureek Doohum defendants 2nd party are identical with the mortgagees or zur-i-peshgeedars, Fureek Awul, their possession is clearly an adverse possession to the plaintiff. The suit was one for ejectment, and therefore as the defendants 2nd party distinctly pleaded that these disputed lands were kharijee lands belonging to Faizoollapore and not incorporated in the nizamut lands of Mukdoompore, that their ancestors and themselves have been in possession for a number of years, it is incumbent upon the plaintiff to show that he himself or some body through whom he claims was in possession of the disputed lands within 12 years prior to suit. Now the Moonsiff has found that the mortgagees and the defendants 2nd party, who are in possession, are not identical, and that there is no connection or collusion between these parties. It is, therefore, clear to us that the possession of the defendants 2nd party has been all along an adverse possession as against the plaintiff on the question of fraud also, the plaintiff states that during the incumbency of the mortgagees, the defendants 2nd party in collusion with them and the kanoongoes set up this plea about these lands being the kharija lands of Faizoollapore, and that they did not discover this fraud until they re-entered into possession upon the redemption of the property. The Moonsiff has found that allegation to be false, and on the whole case we think that the questions of fact have been carefully considered by the Moonsiff, and as his decision has been confirmed by the Judge we cannot interfere in special appeal.

The appeal is dismissed with costs.